

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

NORMAN GARAND

Plaintiff,

v.

J.P. MORGAN CHASE BANK, N.A.; et al.,

Defendants.

3:10-cv-0212-LRH-VPC

ORDER

Before the court are defendants J.P. Morgan Chase Bank, N.A. (“JP Morgan”), as receiver and acquirer of certain assets and liabilities of defendant WAMU Bank, F.A. (“WAMU”), and California Reconveyance Company’s (“CRC”) (collectively “moving defendants”) motion for summary judgment (Doc. #81)¹ and motion to expunge lis pendens (Doc. #82).

Also before the court is plaintiff Norman Garand’s (“Garand”) cross-motion for summary judgment. Doc. #83.

I. Facts and Background

In October 2003, Garand purchased real property through loans with non-party Mylor Financial. The property was secured by a first and second deed of trust. Later, in 2005, Garand refinanced one of the loans for improvements on the property. The third loan was secured by a third

¹ Refers to the court’s docketing number.

1 deed of trust which was recorded on February 25, 2005.

2 Subsequently, on January 23, 2007, Garand again refinanced his loans through defendant
3 WAMU. Both loans were secured by new deeds of trust; the fourth and fifth deeds of trust
4 respectively. Defendant CRC was listed as the trustee under both deeds of trust. After the loans
5 were issued, WAMU went into receivership with the Federal Deposit Insurance Corporation
6 ("FDIC"). Defendant JP Morgan purchased certain assets and liabilities of WAMU including the
7 right to act as loan servicer over the underlying mortgage notes.

8 Garand eventually defaulted on his refinanced loans and defendants initiated non-judicial
9 foreclosure proceedings. On March 8, 2010, Garand filed a complaint against defendants alleging
10 eight causes of action: (1) violation of NRS 106.260; (2) violation of NRS 106.270; (3) violation of
11 NRS 106.290; (4) violation of NRS 107.073; (5) violation of NRS 107.077; (6) violation of
12 NRS 107.080; (7) violation of NRS 107.085; and (8) unjust enrichment. Doc. #1, Exhibit 1.
13 Thereafter, the parties filed the present motions for summary judgment. Doc. ##81, 83.²

14 **II. Legal Standard**

15 Summary judgment is appropriate only when "the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
17 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of
18 law." Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence, together
19 with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable
20 to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
21 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

22 The moving party bears the burden of informing the court of the basis for its motion, along
23 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,

24
25 ² Garand alleges only three causes of action against JP Morgan and CRC: (1) claim six for violation
26 of NRS 107.080; (2) claim seven for violation of NRS 107.085; and (3) claim eight for unjust enrichment.
Doc. #1, Exhibit 1. Therefore, the court shall only address these claims.

1 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party
 2 must make a showing that is “sufficient for the court to hold that no reasonable trier of fact could
 3 find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259
 4 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

5 To successfully rebut a motion for summary judgment, the non-moving party must point to
 6 facts supported by the record which demonstrate a genuine issue of material fact. *Reese v.*
 7 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might
 8 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 9 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary
 10 judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding
 11 a material fact is considered genuine “if the evidence is such that a reasonable jury could return a
 12 verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla
 13 of evidence in support of the plaintiff’s position will be insufficient to establish a genuine dispute;
 14 there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at 252.

15 Where, as here, parties filed cross-motions for summary judgment on the same claims
 16 before the court, the court must consider each party’s motion separately and on its own merits.
 17 *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.
 18 2001) (citations omitted). Accordingly, “the court must consider the appropriate evidentiary
 19 material identified and submitted in support of both motions, and opposition to both motions,
 20 before ruling on each of them.” *Id.* at 1134.

21 **III. Discussion**

22 **A. NRS 107.080**

23 Garand alleges that moving defendants violated NRS 107.080 for two reasons. First, Garand
 24 argues that defendant CRC did not have standing to file the underlying notices of default. Second,
 25 Garand argues that the notice of default did not include the mandatory mortgage mediation
 26

1 information as required under NRS 107.086.

2 As to Garand's argument that CRC lacks standing to file the notices of default, the court
3 finds that his claim is without merit. Under Nevada law, a trustee under a deed of trust can initiate a
4 non-judicial foreclosure and record a notice of default. *See* NRS 107.080(4). Therefore, the court
5 finds as a matter of law that CRC had standing to file the underlying notices of default.

6 As to Garand's argument that the notices of default did not comply with NRS 107.086, the
7 court likewise finds that his claim is without merit. The applicable provisions of NRS 107.086 only
8 apply to "owner-occupied housing." *See* NRS 107.086(1).

9 Here, it is undisputed that Garand did not live at the property in question and instead, used
10 it as rental property. Thus, the underlying notices of default did not have to comply with the
11 requirements of NRS 107.086 as a matter of law because the property was not "owner-occupied
12 housing." Accordingly, the court shall grant moving defendants' motion as to this issue.

13 **B. NRS 107.085**

14 Garand also alleges that moving defendants violated NRS 107.085 by failing to comply
15 with all applicable subsections including identification of the lender and holder of the note. The
16 court finds that Garand's claim is without merit. First, the applicable provisions of NRS 107.085
17 only apply to "owner-occupied housing." *See* NRS 107.085(1)(b). Here, it is undisputed that
18 Garand did not live at the property in question and instead, used it as rental property. Thus, the
19 underlying notices of default did not have to comply with the requirements of NRS 107.085 as a
20 matter of law because the property was not "owner-occupied housing."

21 Further, under Nevada law there is no requirement that a trustee identify the holder of the
22 note, only the lender which has already been identified as WAMU. *See* NRS 107.085. Further,
23 under Nevada law there is no holder in due course requirement for a trustee to initiate a non-
24 judicial foreclosure. *See* NRS 107.080. Accordingly, the court shall grant moving defendants'
25 motion as to this issue.

1 **C. Unjust Enrichment**

2 To set forth a claim for unjust enrichment, a plaintiff must allege that a defendant unjustly
3 retained money or property of another against fundamental principles of equity. *See Asphalt Prods.*
4 *Corp. v. All Star Ready Mix*, 898 P.2d 699, 700 (Nev. 1995). However, an action for unjust
5 enrichment cannot stand when there is an express written contract which guides the activities of the
6 parties. *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187
7 (Nev. 1997).

8 Here, there was a written contract between Garand and WAMU, namely, the deed of trust,
9 which identified defendant CRC as the trustee, and the mortgage note. These documents guide the
10 interactions, obligations, and rights of the parties. As such, Garand cannot make a claim in equity
11 for actions that are guided by a contract to which he is a party. *See LeasePartners Corp.*, 942 P.2d
12 at 187-88.

13
14 IT IS THEREFORE ORDERED that defendants' motion for summary judgment
15 (Doc. #81) and motion to expunge lis pendens (Doc. #82) are GRANTED. Defendants J.P. Morgan
16 Chase Bank, N.A.; and California Reconveyance Corporation are DISMISSED as defendants in
17 this action. Defendants shall have ten (10) days from entry of this order to file a proposed order
18 expunging lis pendens and submit the same for signature.

19 IT IS FURTHER ORDERED that plaintiff's cross-motion for summary judgment
20 (Doc. #83) is DENIED.

21 IT IS SO ORDERED.

22 DATED this 28th day of June, 2011.



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24 _____
LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
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